

Empty Seats in the European Parliament: What About EU Citizenship?

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The European Parliament started its new term with [three empty seats](#). The Catalan politicians Carles Puigdemont, Antoni Comín and Oriol Junqueras got elected in the European Parliamentary elections of 26 May 2019 but the Spanish Central Electoral Commission did not include their names in the list which was notified to the European Parliament on 17 June 2019. The reason is that they did not appear in person to swear or affirm allegiance to the Spanish Constitution, which is a formal requirement under the Spanish election legislation. The President of the EU General Court dismissed an application of Carles Puigdemont and Antoni Comín for interim measures by referring to the Spanish electoral law. Thereby, however, he completely ignored the EU citizenship dimension of the case.

Section 224, § 2 f the '[Representation of the People Institutional Act](#)' provides that:

“Within five days from [the official proclamation of the election results], the elected candidates must swear or affirm allegiance to the Constitution before the Central Electoral Commission. On expiry of said term the Central Electoral Commission is to declare the vacancy of seats assigned to members of the European Parliament having failed to swear or affirm their allegiance to the Constitution, as well as the suspension of any prerogatives to which they may be entitled on account of their mandate, as long as they do not make the aforesaid oath or affirmation.”

One of the elected Catalan politicians, Oriol Junqueras, is currently in custody awaiting a verdict in the trial related to his role in the organisation of the independence referendum in October 2017 and the subsequent unilateral declaration of independence of Catalonia. The [Spanish Supreme Court](#) decided that Mr. Junqueras could not be given permission to complete the accreditation process in Madrid. The key argument used by the Supreme Court is that it may lose 'jurisdictional control' if he could be sworn in as a member of the European Parliament. The Court thus essentially wants to prevent that the granting of European parliamentary immunity would interfere with the pending trial at the national level. In this respect, a legal question is whether this immunity only applies after the end of the entire accreditation procedure or whether European parliamentary immunity already applies from the moment someone is elected to the European Parliament. The Spanish Supreme Court may bring this issue to the EU Court of Justice in the form of a [preliminary reference](#).

The situation of the two other politicians, former Catalan President Carles Puigdemont and former Minister Antoni Comín, is significantly different. They are

both living in self-imposed exile in Belgium and can be arrested when returning to Spain. The Spanish Central Electoral Commission nevertheless insisted that they appeared in person and rejected the option of a written statement done in front of a public notary as a valid alternative of pledging allegiance to the Spanish Constitution. Accordingly, their names were not transferred to the European Parliament, which informed the Catalan politicians that they cannot take their seats as long as their accreditation process in Spain is not completed.

A matter to be settled by the national authorities?

Carles Puigdemont and Antoni Comín brought an application for interim measures before the General Court of the EU, requesting the suspension of the European Parliament's decisions concerning the results of the European Parliamentary elections as declared by Spain in order to enable them to take their seats in the parliament as from the start of the new session on 2 July 2019 onwards. In an [order](#) delivered on 1 July 2019, the President of the General Court dismissed the application. Based upon a literal interpretation of the secondary EU legislation concerning the election of representatives of the European Parliament, the President observed that the Parliament can only 'take note' of the notification made by the national authorities without any discretion for the Parliament itself to call in question the validity of the declaration made by the national authorities. Moreover, on the requirement to appear in person in order to swear allegiance to the Spanish constitution, the order simply concludes that "it is for the national courts [...] to rule on the lawfulness of the national electoral provisions and procedures". In other words, the President of the General Court echoed the reasoning of (former) European Parliament President Antonio Tajani, who said that ['it's Spain's problem'](#) that some of the seats in the Parliament remain vacant.

What about the effective application of EU citizenship rights?

Arguably, the reluctance of the President of the General Court to engage with the substance of the matter is largely related to the specific nature of the interim procedure. Nevertheless, it is remarkable that the link between the Spanish practice and the effective application of EU citizenship rights remained completely absent in this discussion. After all, the right to stand as a candidate in elections to the European Parliament is one of the core rights connected to the status of Union citizenship, as defined in Article 20 (2) b TFEU and Article 39 of the Charter of Fundamental Rights.

It is true that in the absence of a uniform procedure in all Member States, European parliamentary elections are still essentially governed by national laws. However, as is the case for other areas falling within the competence of the Member States, there is an obligation not to exercise these competences in a way contrary to EU law. An interesting parallel can be drawn with the [Delvigne](#) case where the Court had to rule on the compatibility between (French) national legislation providing for

the deprivation of the right to vote in the case of a criminal conviction. In this case, the Court clarified that Member States are bound, when exercising their national competences in the area of election procedures, by the obligation to ensure that the election of Members of the European Parliament is by direct universal suffrage and free and fair.

It seems that the Spanish requirement to swear allegiance to the national constitution affects the direct nature of the European Parliamentary elections and the *effet utile* of the right of every Union citizen to stand as a candidate for these elections as guaranteed under Article 39 of the Charter. What is the meaning of the right to stand as a candidate for European Parliamentary elections when national requirements prevent that elected candidates can take up their seats? In this respect, it must be borne in mind that Article 52 (2) of the Charter accepts that limitations may be imposed on the exercise of the Charter rights as long as they are provided by law and respect their essence. Moreover, 'subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others'.

Applied to the Spanish election legislation, it appears impossible to see how the requirement to swear allegiance to the national constitution in order to take a seat in the European Parliament satisfies the conditions of Article 52 (2) of the Charter. Members of the European Parliament are supposed to be directly elected and represent the Union citizens, not the states of their nationality. Hence, it may well be argued that this requirement undermines the essence of a fundamental right in the EU legal order. In addition, the necessity to appear in person in front of the electoral commission and the rejection of an alternative method of pledging allegiance while based in another Member State contradicts the principle of proportionality. The real objective of this strict application of the Spanish election legislation appears to prevent the elected Catalan politicians to take their seats in the European Parliament.

To be continued

In any event, the order of the President of the General Court does not make an end to the discussions. The General Court still has to rule on the substance of the case in the main proceedings. Moreover, there is a possibility of appeal against the order of the General Court before the Court of Justice. Last but not least, a legal action against the requirement to swear allegiance to the Spanish constitution is pending at the national level. Taking into account the EU law dimension of the issue, a request for a preliminary ruling from the Court of Justice to rule on the lawfulness of the national electoral provisions and procedures is to be expected. Hence, despite the politically sensitive nature of the Catalan question, which is essentially an internal matter for Spain which has to be dealt with in line with the Spanish constitution, fundamental questions of EU law – such as the effective application of EU citizenship rights – cannot be simply ignored.

